SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 458

EMPIRE STATE EXPRESS, INC.,

Petitioner,

vs.

TRUCK DRIVERS AND HELPERS LOCAL UNION No. 728, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Now comes the Respondent named hereinabove and files its brief in opposition to the Petition for Writ of

Certiorari to United States Court of Appeals for the Fifth Circuit, and Respondent prays that this Court deny the Petition for Writ of Certiorari.

I. OPINIONS BELOW

Petitioner refers to a decision of the National Labor Relations Board, Case No. 10-CC-131, 116 NLRB 615, as being an "Opinion Below". Respondent points out that this is inaccurate; the NLRB decision referred to was a proceeding independent of, and a decision rendered prior to, the institution of the damage action now before this Court on Petition for Certiorari. Respondent further shows that although Petitioner urged the District Court to rule on the question of the NLRB decision being res adjudicata, upon the District Court rejecting such contention the question was never raised in the Circuit Court and was never before the Circuit Court for consideration.

II. QUESTIONS PRESENTED

In regard to the portion of Petitioner's Application for Certiorari designated as "Questions Presented", Respondent points out to this Court that the injunction of November 3, 1955, referred to in Question 1 (Page 3 of Petitioner's Application) was a proceeding under Section 10 (1), LMRA, and was not a proceeding in which the merits of the case were in issue.

III. STATUTES INVOLVED

Pertinent statutory provisions, in addition to those contained in Petitioner's application:

29 USCA 152(2)—"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly—".

29 USCA 152(13)—"In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

29 USCA 142(2)—"The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operation by employees."

IV. ADDITIONS AND CORRECTIONS TO STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

Although there were many assignments of error which Respondent placed before the Circuit Court for consideration in Respondent's appeal from the adverse judgment of the District Court, the Circuit Court's

decision made it unnecessary that that Court rule on the other assignments of error before it.

In regard to the question of whether an unlawful secondary boycott had been committed by Respondent, Respondent's position in the District Court, the Circuit Court, and before this Court, was, and is, that there was no dispute in any material facts which concern the question of whether an unlawful secondary boycott had been committed by Respondent. While Respondent does not agree with Petitioner's statement that all material facts were *admitted* in the case, nevertheless it is correct that those material facts which were not admitted were in fact uncontroverted.

B. STATEMENT OF THE FACTS RELIED ON BY RESPONDENT

In view of the fact that the Statement of Facts "Relied on by Respondent", contained in Petitioner's Application, are grossly incomplete, and fail to make reference to the pages of the Record, Respondent hereby submits the facts upon which it primarily relied on the question of whether a secondary boycott was committed.

As pointed out in the opinion of the Lower Court, prior to August 1, 1955, there existed in the State of Georgia an over-the-road truck line known as ACA Motor Lines, Inc. (hereinafter referred to as ACA). ACA's territory covered a number of communities south and southwest of Atlanta, its northern terminus

and headquarters. In Atlanta, ACA collected freight from local shippers and distributed to local consignees. ACA performed its own pick-up and delivery work. The freight was brought to ACA's terminal and loaded in its trailers for shipment south to the communities it served.

ACA went out of business on or about August 1, 1955, and sold its franchise and some of its equipment to Petitioner, and Petitioner began its operations on August 1, 1955. Petitioner did not engage in pick-up and delivery operations itself in Atlanta. Instead, Petitioner entered into a contract with Service Cartage Company (referred to hereinafter as Service) which was a partnership composed of one Viness and one Busby, and under the agreement Service agreed to handle the pick-up and delivery of Petitioner's freight in Atlanta. Among other things, under the Agreement, Service was to maintain a terminal in Atlanta to serve as a pick-up and distribution center for freight carried by Petitioner. All of Service's employees (pick-up and delivery men) were former employees of ACA for whom they had performed similar pick-up and delivery work. Thus, subsequent to August 1, 1955, the employees who previously had performed over-the-road driving for ACA out of Atlanta were now performing over-the-road driving for Petitioner out of Atlanta and the employees who had previously performed pick-up and delivery work in Atlanta for ACA now were performing pick-up and delivery work in Atlanta for Service.

Petitioner decided to base its operations at its home office in Columbus, Georgia. This created the problem of what to do about the over-the-road drivers domiciled in Atlanta who were the former employees of ACA. Petitioner desired that these driver move to Columbus, Georgia as soon as possible. In the meantime they were to work out of Atlanta driving Petitioner's trucks south. While based in Atlanta, these drivers were to be, and were, dispatched by Mr. Viness of Service.

On August 26, 1955, the five over-the-road drivers refused to drive the trucks from the Atlanta terminal because they claimed the equipment was unsafe. The following day Petitioner sent other of its employees from Columbus to Atlanta in order to move the trucks. The five over-the-road drivers never returned to work, although they did go to the Atlanta terminal at various times. These drivers were never given notice of discharge and no one was hired to replace them.

The five over-the-road drivers were members of Respondent Union. On July 28, 1955, prior to Petitioner's commencing its business operations, an official of Respondent had contacted Petitioner requesting that Petitioner recognize Respondent as the exclusive bargaining representative for the five drivers. The issue was discussed, but not decided at that time. On August 29, an official of Respondent again contacted Petitioner in regard to signing a contract recognizing Respondent as the bargaining agent for the five

drivers. Petitioner took the position that it had no over-the-road drivers belonging to Respondent Union "because of what took place" on August 26, stating that "they refused to work and—anytime anyone refused to work and operate and do that which they were told to do, they automatically quit and left our employ." On or about September 9 or 10, Petitioner specifically made clear its refusal to recognize Respondent as the bargaining agent for the five drivers.

On September 13, Respondent established a picket line at the Atlanta terminal, the pickets carrying signs stating that the Local was on strike against Empire State Express. Upon the picketing commencing, a representative of Respondent told the employees of Service to go out on strike and they did so go out on strike.

The telephone at the Atlanta terminal was listed in the name of Petitioner (R. 96). The telephone at the Atlanta terminal was not listed in the name of Service at all (R. 96). That telephone was on a number of occasions answered "Empire State Express" (R. 96). One of the local drivers testified that, after he was actually in the employ of Service, that "When I walk in the building I say, 'Have you got anything for Empire State Express?' ". (R. 697).

There were no signs on the terminal building of Service in Atlanta indicating that it was the terminal of either Service or Empire. Both Empire and Service distributed to shippers printed circulars which

advertised the Atlanta terminal as that of Empire and made no mention of Service.

Practically all of the freight handled by Service from the date of commencement of business of Petitioner and Service up until the commencement of the picketing was freight of Petitioner and any freight handled for other carriers by Service was almost negligible (R. 93).

Service permitted Petitioner to keep all of its tractors, trailers and other equipment not on the road or temporarily not in use, as might be convenient or desired by Petitioner, at the terminal of Service in Atlanta (R. 94).

From August 1, 1955, to August 26, 1955, Service did not own any trailers, and when trailers were necessary in expediting business, Petitioner permitted Service to use Petitioner's trailers and this interchange of equipment was engaged in by Petitioner and Service not only through August 26, 1955, but also to about August 15, 1956 (R. 96). From August 1, 1955, through the month of September, 1955, Service owned three trucks and two tractors and during said period Petitioner lent to Service, without charge, one of Petitioner's trucks. (R. 97). From August 1, 1955, to August, 1956, the tractors owned by Service, in order to expedite pick-up and delivery in Atlanta, pulled trailers belonging to Petitioner and bearing the name of Petitioner (R. 97).

On August 1, 1955, and through the month of September, 1955, Service did not own any trailers and when trailers were necessary for pick-up of large loads of freight or delivery of same, the trailers of Petitioner were used (R. 98).

The five over-the-road drivers of Petitioner who were domiciled in Atlanta received their instructions from Jack Viness, partner of Service, from August 1 until they struck on August 26. (R. 94). From August 1, 1955, to the time they struck on August 26, 1955, Mr. Viness kept the telephone numbers of the five over-the-road drivers of Petitioner residing in Atlanta and Viness called them to report to work in Atlanta (R. 94). From August 1, 1955, to August 26, 1955, the log books and time records of the five over-the-road drivers were delivered by the drivers to Viness at the terminal in Atlanta and Viness immediately sent them to Columbus, Georgia. (R. 95). The checks for payment of the wages of the drivers operating out of Atlanta were sent to Mr. Viness and Viness distributed such checks to the drivers at the Atlanta terminal (R. 95).

There was uncontradicted testimony at the trial. by the President of Respondent Union, that Mr. Viness acted as Petitioner's agent in regard to Petitioner's labor relations with the five over-the-road drivers who were later involved in the dispute (R. 712, 713).

As pointed out in the opinion by the Circuit Court, Mr. Rowlenson, one of the owners of Petitioner, ad-

mitted that the five over-the-road drivers who were later involved in the dispute received "little or none" in instructions or directions from the home office of Petitioner in Columbus, Georgia, but "they received their instructions from Mr. Viness, as was prearranged".

As was also pointed out by the Circuit Court, the relationship between Petitioner and Service was so close that at least one of the local drivers, who in fact was an employee of Service, testified that he "guessed" he worked for Empire State (Petitioner) although his testimony showed he knew that Viness was the man who paid him (R. 696). Another of the local drivers, who in fact was at the time an employee of Service, testified to the effect that he did not even realize there was such a company as Service Cartage Company until he received his first pay check which was written by Service Cartage Company. (R. 704).

The facts in this case show that for all practical purposes the work of the five over-the-road drivers and of the local pick-up and delivery men was maintained in practically the same operation after Petitioner assumed the over-the-road operation of ACA and Service assumed the pick-up and delivery work of ACA in Atlanta as had been maintained when both operations were being performed by one corporate entity. To paraphrase the Circuit Court, the economic fortunes of Petitioner and Service were as inextricably interwoven as were the pick-up and delivery

operations and over-the-road operations of ACA when ACA was performing both functions.

V. SUMMARY OF ARGUMENT

Concisely stated, this Court should deny certiorari for the reasons set forth below:

A. THE LOWER COURT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT, DECISIONS OF THE FIFTH CCA, OR DECISIONS OF OTHER CIRCUIT COURTS OF THE UNITED STATES.

The essence of the holding of the Lower Court is two-fold:

(1) A third party is not insulated from picketing activity unless it is an unconcerned neutral to the dispute, and

(2) The uncontroverted facts belonging to this particular case show that Service was not an unconcerned neutral to the dispute.

Insofar as Respondent has been able to ascertain, the proposition that only a neutral, unconcerned, third party is protected by the secondary boycott provisions of the Act is a proposition which has not been denied by any of the Appellate Courts of the Federal Judiciary.

B. NO SUBSTANTIAL BENEFIT TO THE DEVELOPMENT OF THE LAW, OR TO THE GUIDANCE OF THE LOWER FEDERAL COURTS, WOULD BE SERVED BY THIS COURT ATTEMPTING TO SPELL OUT A "COLLEGIATE-DICTIONARY" TYPE DEFINITION OF A "NEUTRAL PARTY".

As has been recognized by the Courts, the variations of factual situations to which this area of law must be applied are almost infinite. The various and sundry economic alignments which will result in such varying factual situation cannot be predicted, with accuracy, by any individual or tribunal. Consequently, no "pat" definition which may be arrived at would be of substantial benefit to any Court attempting to determine whether such definition would fit a particular employer within a particular factual situation.

C. THE CONTENTION THAT THE LOWER COURT "DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS—" SO AS TO CALL FOR EXERCISE OF THE POWER OF SUPERVISION BY THIS COURT IS NOT ONLY WITHOUT ANY MERIT, BUT MERELY CONSTITUTES A DEROGATORY ATTACK UPON THE PANEL OF JUDGES WHO DECIDED THIS CASE BELOW.

The contention of Petitioner in this respect appears to be based, in the main, on two grounds:

(1) That the lower Court "usurped" the powers of the jury, and

(2) The lower Court improperly commented on the charge to the jury by the Trial Court.

The Petitioner's position concerning the lower Court's "usurping" the jury's powers and functions is completely destroyed by its own brief, as will be more thoroughly pointed out hereinafter.

While it may not have been *necessary*, in view of the points on which the lower Court decided this case, for the Lower Court to comment on the charge to the jury, nevertheless it is within a judicial body's power and propriety to so comment if it chooses to do so.

D. NO ERROR WAS COMMITTED BY THE LOWER COURT.

The Lower Court's decision was a correct one, and in keeping with the intent of the Act, as abundantly shown by the legislative history of the original Act, as well as by the legislative history of recent amendments to the Act. The basic premises of the lower Court's decision in this case are consistent with the decisions of practically all, if not all, the Appellate Courts within the Federal Judiciary.

VI. ARGUMENT

A. THERE IS NO CONFLICT BETWEEN THE DECISION IN THE CASE AT BAR AND OTHER AUTHORITATIVE FEDERAL DECISIONS IN THE SAME AREA OF THE LAW.

As pointed out by the lower Court in its decision (Petitioner's Application, A15) the requirement that the secondary employer be a "neutral" to have the protection of the law is firmly established in the case law. *Retail Fruit and Vegetable Clerk's Union v. National Labor Relations Board*, 1957 9 Cir., 249 F. (2d) 591, 594; *Carpenter's Union v. National Labor Relations Board*, 1958, 357 U.S. 93, 100, 78 S.Ct. 1011, 1017; *National Labor Relations Board v. International Rice Milling Company*, 1951, 341 U.S. 665, 670-71, 71 S.Ct. 961, 964; *J. G. Roy & Sons Co. v. National Labor Relations Board*, 1 Cir., 1958, 251 F. (2d) 771, 772; *Local No. 24 v. National Labor Relations Board*, 1958, 266 F. (2d) 675, 680, D.C. Cir.

The solitary case cited by Petitioner which indicates a conflict with the decision of the Court below is the District Court decision cited as *Curto v. Longshoremen's and Warehousemen's Union CIO*, 107 F. Supp. 805, footnote 15. In that case the District Judge apparently took the position that if the two employers involved are not "the same" then the third party employer is completely protected from any appeal to its employees no matter how involved it may be, as a practical fact, in the dispute. Respondent

submits that this District Court's position has been refuted, time and again, by the Appellate Courts of the Federal Judiciary and certainly poses no conflict worthy of this Court's resolution.

In the decision of Judge Hand, referred to in the Petition for Certiorari, *International Brotherhood of Electrical Workers Local 501 v. National Labor Relations Board*, 181 F. (2d) 34, the joint venture referred to by Judge Hand consisted only of the fact that two companies were working on the same construction job; this certainly does not remove one of the parties working on this job from the protection of the Act simply because of that fact. It has never been contended by Respondent in this case, nor is it contended at this point, that the law was other than as stated in a situation such as that which existed in the Local 501 case.

Certainly the decision of the Lower Court does not raise any conflict with other Federal Appellate decisions which requires review by this Court.

B. NO BENEFIT WOULD RESULT FROM THIS COURT DEFINING A "NEUTRAL PARTY".

At Page 40 of Petitioner's Application for Certiorari, Petitioner's counsel states as follows:

> We begin, of course, with the premise that in such a legal area no all-embracing guide can be announced, and each case must be decided some-

what if not altogether on its own facts, circumstances, and most important of all, the particular relationships therein existing."

Insofar as this particular case is concerned the quoted statement of Petitioner's counsel that "—in such a legal area no all-embracing guide can be announced—" would appear to, in effect, estop Petitioner from going further and requesting this Court to announce some "all-embracing guide" by laying down a "definition" of a neutral employer to be used by the lower Courts in all cases of this nature which come before them.

However, believing that it is the province of this Court to look beyond the mere considerations of the narrow interests of the parties to this particular litigation, it is felt proper to consider whether the announcement of such a "definition" by the highest Court in the land would be of service in development of the law in this area and in guidance of future disputants. It is the position of Respondent that it would not.

Unfortunately, in the past history of the law, legislators, lawyers, and judiciary have been guilty of lagging behind the changing realities of our society and of our economy and have been too prone to attempt to lay down legalistic formulae and expect such formulae to be sensibly applied to varying factual situations presented to the Courts. Perhaps in the simple society and economy that existed many years

ago this approach was adequate, and perhaps it was best. But such an approach cannot be sensibly used in today's society and economy.

Fortunately, in recent years the Courts, and particularly the Federal Judiciary, have progressively recognized that the complexities of today's society and economy are such that the use of pat definitions and legalistic words or phrases cannot be pulled from a hat and applied, with justice, to the many diverse factual situations which occur in life.

In the particular area of the law which we now have under consideration, Respondent feels that it cannot improve upon the statement of Chief Judge Prettyman, speaking for the D.C. Circuit, in the case of *Local No. 24 v. NLRB*, 1958, 266 F. (2d) 675, 680, when he stated that:

> "The answer to the problem before us cannot be reached by the use of any legalistic word or phrase, such as 'coemployer', or 'independent contractor', or even 'ally'. It cannot be solved by the strict application of the technicalities which adhere to such legal terms—.
>
> "It is our view that the relationships of ACE, the drivers, and the lessor-owners are so intertwined with respect to employment that ACE was not protected by the statute against the impact of a strike by the drivers against the lessor-owners. The many tiny strands of ACE control over these drivers cannot be extricated from the

total fabric of mutual obligation. Those strands are clearly part of the pattern of the employer-employee relationship.

"As pointed out in *Seafarers International Union, etc. v. NLRB*, this section (8)(b)(4)(A) and (B) cannot be read or applied literally; it must be construed. Of course, in an area so wide as is the field of labor relations, there are many situations in which the answer to a dispute under this section is easily derived by the application of such legalistic formulae as 'independent contractors', 'coemployers', of 'allies'. But it is equally clear that there is a zone of dispute in which such formulae are useless and the answer must be derived by applying the intent of the statute to the facts in the case. *This is such a case. We need not devise a new word to describe the relationship here depicted.*" (Emphasis supplied).

This Court stated, in *Local 761 International of E. R. & M. Workers v. NLRB*, 81 S.Ct. 1285, in discussing how the courts had applied the Moore Dry Dock standards, that "As is too often the way of law or, at least, of adjudications, soon the Dry Dock tests were mechanically applied so that a violation of one of the standards was taken to be presumptive of illegal activity."

The adoption of formulae, and of standards, by authoritative tribunals is often necessary and of tremendous benefit to the guidance of parties and to lower tribunals, but "as is too often the way of law—" there

is ever the tendency to, in an effort to comply with the pronouncements of the higher tribunal, "mechanically" apply such standards and, also often, this inevitably results in an attempt to fit a "square" definition or standard to a "round" factual situation—and the end result is manifest injustice!

As stated by Judge Prettyman in the Local No. 24 case, supra, "—the answer must be derived by applying the intent of the statute to the facts in the case."

Is the intent of the statute not clear by this time? The sponsor of the original legislation, Senator Taft, is officially on record in stating the intent of these provisions of the statute and his statements in this regard have been quoted to this Court on so many occasions that it is not deemed necessary to repeat them at this time. The legislative history of the Labor-Management Reporting and Disclosure Act of 1959, as cited in Footnote 18 of the Lower Court's decision in this case, re-emphasizes and reiterates the intent of the original legislation. The vast majority of the courts have accepted and recognized, without considerable difficulty, the clear intent of the legislation. This being true, should there be great difficulties in following the suggestion of Judge Prettyman and applying the intent of the statute to the facts in a given case? Should this Court respond to the call, made again and again by unsuccessful litigants in the Circuit Courts, to place a strait-jacket of legal formulae on every question of law?

C. THERE IS NO MERIT IN PETITIONER'S CONTENTION THAT THE LOWER COURT DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THE EXERCISE OF THE POWER OF SUPERVISION BY THIS COURT.

Petitioner appears to base this contention, in the main, on a contention that (1) the lower Court "usurped" the powers of the jury, and (2) the lower Court improperly commented on the trial Judge's charge to the jury.

At Page 4 of Petitioner's Application for Certiorari Petitioner states that:

> "There were controverted questions of fact, and Petitioner and Respondent placed different interpretations on proven facts, all submitted to the jury for verdict; but nevertheless, the lower Court usurped the function of the jury in passing on such issues—".

If Petitioner is to substantiate his contention that the lower Court "usurped" the function of the jury, Petitioner must, of course, contend that there were controverted, material, facts pertaining to the question of commission of an unlawful secondary boycott. Certainly if the facts were *not* in dispute on this issue, then it became the duty of the Court, not of the jury, to announce the legal conclusion and effect of such uncontroverted facts.

Were there controverted, material, facts on the issue of whether a legal boycott had been committed? First, let us see whether the Petitioner is consistent in stating that there were controverted, material, facts which the jury could properly pass upon.

After making the above quoted statement at Page 4 of its Application, we find the following statement of Petitioner at Page 7 of its Application for Certiorari:

> "*In the end, there was not a single controverted or contested fact left for the jury to decide with regard to the boycott issue;*—" (Emphasis supplied).

Also, at Page 7 of the Petitioner's Application for Certiorari (in fact in the *very next paragraph*) we find Petitioner making this statement:

> "The only issue between Petitioner and Respondent on the boycott question was completely legal.—".

What was Petitioner's position in the Trial Court in this regard? At Page 26 of Petitioner's Application for Certiorari its position in the trial Court is revealed. As stated at Page 26, attorneys for Petitioner moved for a directed verdict on the boycott issue, with the following motion:

> **"Mr. Swinson: Your Honor, the plaintiff moves for directed verdict against the defendant on the issue of liability alone, or that the Court instruct the jury to the same effect; that is, that the issue of liability would not be decided by the jury and that only the issue of damages will be submitted."**

In view of the above position taken by Petitioner, both in this Court and in the Trial Court, how can Petitioner, in seriousness, now contend that the Circuit Court "usurped" the jury's function insofar as the question of commission of an unlawful boycott was concerned?

This particular question probably is the sole and solitary one upon which the parties litigant have been in agreement, up until this time. The record reflects (R. 744) that Respondent also moved for a directed verdict on the entire case to the Trial Court and it was one of the positions of Respondent, in so moving the Court, that there were no disputed material facts in regard to the question of liability. The difference between the parties litigant, at all stages of this case, has been that Petitioner claimed that the legal result of the facts required a finding that an illegal boycott had been committed, whereas Respondent has contended that the legal result of the facts required a finding that no illegal boycott had been committed.

While counsel for Respondent appreciate the desire of a capable and competitive attorney to salvage his

case, nevertheless it is difficult to understand how counsel for the Petitioner can seriously make any contention that the Circuit Court "usurped" a jury's function in regard to the question of liability.

The next position on which Petitioner appears to contend that the Circuit Court should be "supervised" by this Court seems to be hinged to the fact that the Circuit Court commented on and criticized the Trial Court's instruction to the jury, although the Circuit Court eventually held that this was a case which should never have been considered by the jury.

In all fairness, a statement that there was no necessity for the Circuit Court to comment on the instructions to the jury might have considerable weight, if limited to that statement. Surely, however, no criticism beyond such a comment could justifiably be made of the Circuit Court's commenting upon the instructions to the jury.

As indicated earlier in this brief, there were innumerable assignments of error presented to the Circuit Court by Respondent, in addition to the one upon which the case turned in the Circuit Court. The Circuit Court did not see fit to comment on those questions not necessary for a final determination of the case. However, had they done so, would this be any basis for a blistering attack upon the Circuit Court? Would such be any basis for a statement that the respected panel of Judges who decided this case should be placed under "supervision"? Would such be justi-

fication for the statement made by Petitioner's counsel (Application for Certiorari, p. 4) that "The opinion of the Lower Court is vague and imprecise and so far below the demonstrated abilities of each of the Judges that composed the panel that it is not understandable. Why?", with the imuendoes and implications suggested and raised by such statement of Petitioner's counsel?

Counsel for Respondent do not pretend to know, with certainty, why the Circuit Court chose to comment on the Trial Court's instruction to the jury. However, we suggest that there could be many wholesome reasons for such comment—and we suggest further that it is the duty of lawyers, as officers of the Court, to resolve any doubt as to motivation for a Court's statements and actions in favor of the dignity and bona fides of the Court.

It could well be that the Circuit Court used the instructions as a vehicle for clarifying the question of "agency" and, in fact, this did constitute a sound and logical example of its statement (Application for Certiorari, p. A9) that "this is an area where precise delineation is extremely difficult."

In any event, a contention that the Circuit Court needs "supervision", based on such trivial grounds, is completely devoid of merit.

D. THE LOWER COURT'S DECISION WAS CORRECT.

In regard to this question, it would be difficult, if not impossible, to present a more forceful argument as to the correctness of the lower Court's decision than is contained in the decision itself, and, in the main, Respondent submits the decision and opinion of the lower Court, together with the citations of authority contained therein, as sufficient argument thereon.

Since it would serve no useful purpose to repeat the decision and opinion of the lower Court in this brief, Respondent will not burden this Court with such repetition. However, Respondent does desire to point out certain portions of the decision and opinion of the lower Court which seem particularly persuasive. In addition, contained herein will be certain statements from tribunals considering this case in independent proceedings which Petitioner saw fit to omit from its Application for Certiorari.

As pointed out by the lower Court, the extremely close relationship between the Service Cartage Company and Petitioner is forcefully illustrated by the fact that Viness, one of the partners in Service, exercised almost exclusive supervision over the over-the-road drivers of Petitioner, those drivers being members of Respondent local union and being the drivers over whom the dispute arose. Mr. Viness ceased to exercise such supervisory and managerial function over such employees only when there were no longer any drivers to supervise, and not because he was dis-

inclined to serve as their supervisor, nor because Petitioner wished that he no longer do so. As stated by the Circuit Court (Petitioner's Application for Certiorari, p. A17) the facts show that "insofar as Empire and Service were concerned, they were satisfied to have Viness continue as he had." And any revocation of authority to supervise the drivers "— came after the over-the-road drivers refused to drive, when there was no one for Viness to supervise. And once the strike began, and it began when the drivers refused to drive, the employer could not make a change in form which would deprive the strikers of the right to call on their fellow drivers to support their action."

Again, as pointed out by the lower Court, (Petitioner's Application for Certiorari, p. A16) the situation prior to August 1, 1955, when ACA was in existence, is revealing. At that time the employees later employed by Service were engaged in local cartage work and were the employees of ACA doing the same work. Prior to August 1, 1955, the five over-the-road drivers were also employees of ACA, performing the same services they subsequently performed for Petitioner. As stated by the lower Court:

> "Had the over-the-road drivers struck when ACA was in existence, it is clear that if they had induced a strike by their fellow employees who were engaged in the local cartage operations, there would not have been an illegal secondary boycott. This would be true because no employees of 'any other employer' had been induced to strike. In what way, if any, did events subse-

> quent to July 31, 1955, convert what would not have been illegal prior to that date into a prescribed secondary boycott? ACA was split in two. The over-the-road drivers were now technically the employees of Empire, while the local employees worked for Service Cartage Company. The economic fortunes of the two companies were as inextricably interwoven as they were when both entities were ACA, and Mr. Viness of Service still retained general supervision of the over-the-road drivers of Empire."

The lower Court, at the end of its opinion, stated, with irrefutable logic, that:

> "The immediately preceding economic history of the two companies, plus the fact that nearly all of Service's business was with Empire, plus the fact that the over-the-road drivers were generally supervised and dispatched by Viness, establishing an overlapping of management functions between Service and Empire, convinces us that Service was not the unconcerned neutral employer whom Sections 8(b)(4) and 303 of the Taft-Hartley Act were designed to protect, and thus that Empire was not the victim of an illegal secondary boycott."

Although Petitioner has chosen to cite to this Court the decision of NLRB when this dispute was before NLRB in an independent proceeding and in which the majority opinion of the Board found against Respondent, Petitioner did not choose to point out to this Court that the Board's decision was not unanimous, nor did he give the benefit of the dissenting opin-

ion to this Court. In order that the Court may have this dissent for consideration, certain excerpts from the dissent by Member Abe Murdock is contained hereinafter. This decision is *Local No. 728 Teamsters and Empire State Express, Inc.*, No. 10-CC-131, 116 NLRB 615. In his dissenting opinion, Member Murdock stated, in part, as follows:

> "In finding that Service was an independent contractor the majority p'aces great reliance upon the fact that Service ceased dispatching Empire's drivers on August 29 before the picketing began. It seems to me that this circumstance is not in and of itself sufficient to warrant the conclusion that Service had ceased acting as Empire's agent in Atlanta. It is well settled law that 'acquiesence by the principal in a series of acts by the agent indicates authorization to perform similar acts in the future.'—Empire had no need to dispatch drivers from Atlanta after August 26 because from that date the Atlanta drivers were voluntarily withholding their services pending settlement of their dispute. The fact that Service ceased dispatching drivers on that date does not mean that its authority to act as Empire's agent in Atlanta had been revoked or that it might not in the future resume such services if Empire should have need of them. — Together with Empire, the Service partnership constituted the emp'oyer under the express definition of Section 2(2) of the Act, engaged in a labor dispute with the Respondent at the Atlanta premises.

"Accordingly, as only one employer is involved in this case, I would affirm the Trial Examiner's ultimate conclusion and dismiss this complaint in its entirety."

Petitioner has also seen fit to refer to the temporary injunction which was issued pursuant to Section 10(1), National Labor Relations Act, as amended, in an independent proceeding prior to institution of the case at bar. This case was *John W. Thomas, Acting Regional Director of the Tenth Region of the National Labor Relations Board for and on behalf of the National Labor Relations Board, Petitioner v. Truck Drivers and Helpers Local Union No. 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent*, Civil Action No. 5382, United States District Court, Northern District of Georgia, Atlanta Division. In that case District Judge Boyd Sloan entered an order of temporary injunction enjoining the picketing on November 3, 1955. However, in his opinion in the case, the District Judge had this to say:

"In respect to the following findings in which the Court holds that the Petitioner has reasonable cause to believe that Empire and Cartage are two independently operated businesses, etc. this Court feels impelled to state that if it was free to make its own determination of this controverted issue, it would be inclined to the view that the relationship between Cartage and Empire is so close that Cartage should be regarded as an ally of Empire. *While this Court, if free to do so, would*

> *hold that Cartage was not such a disinterested neutral or secondary employer as to come within the protection of the Act*, the Court must concede that there is evidence which would authorize the Petitioner to reach the conclusion which he has obviously reached, and so—" (Emphasis supplied).

(The name "Cartage" as used in Judge Sloan's opinion refers to Service Cartage Company.)

(Insofar as can be ascertained by Respondent's counsel the above District Court's decision has not been officially reported.)

It is respectfully submitted that there was no error committed by the Circuit Court in the case involved.

VII. CONCLUSION

Respondent submits that the Petition for Certiorari should be denied by this Court and Respondent respectfully prays that the petition for Certiorari be so denied by this Court.

This the 20 day of October, 1961.

Respectfully submitted,

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CERTIFICATE OF SERVICE

STATE OF GEORGIA
COUNTY OF FULTON

I, Edwin M. Pearce, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served the Petitioner in the captioned case with the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari by mailing, with proper postage affixed, two copies of said printed Brief to counsel for Petitioner, Mr. W. Edward Swinson, Attorney at Law, 1214 Third Avenue, P. O. Box 548, Columbus, Georgia.

This 20th day of October, 1961.

/s/ Edwin M. Pearce
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